No. 92-1150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHEMICAL MANUFACTURERS ASSOCIATION and
AMERICAN PETROLEUM INSTITUTE,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE HAZARDOUS WASTE TREATMENT COUNCIL, NATURAL RESOURCES DEFENSE COUNCIL, ENVIRONMENTAL DEFENSE FUND, AND SIERRA CLUB

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QUESTIONS PRESENTED

1. Whether the court of appeals adhered to the well-settled principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("Chevron Step I") in holding that section 3004(m)(1) of the Resource Conservation and Recovery Act ("RCRA") requires that the toxic contaminants in hazardous wastes be treated to minimize threats, not merely diluted.

2. Whether the court of appeals employed the proper Chevron Step I analysis in holding that section 1006 of RCRA on its face directs EPA to integrate RCRA with other environmental statutes in a manner that does not override the express statutory requirements of RCRA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF PARTIES	1
STATEMENT OF THE CASE	2
The RCRA Land Disposal Prohibitions	2
The Third-Third Rule	3
The D.C. Circuit Decision	5
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE COURT OF APPEALS DETERMINED THAT EPA'S INCONSISTENT CONSTRUCTION OF SECTION 3004(m)(1) DID NOT ACCORD WITH CONGRESS' CLEAR INTENT	6
A. The Court Relied On The Plain Meaning of Section 3004(m)(1)	6
B. The Court Applied The Same Construction of Section 3004(m)(1) To Characteristic Wastes Managed in CWA Lagoons and SDWA Injection Wells	9
C. The Court Could Not Defer To EPA's Self-Contradictory Rationale	10
II. THE COURT'S CONSTRUCTION OF SECTION 1006 COMPORTS WITH THE CLEAR INTENT OF CONGRESS	11
A. The Court Held That Section 1006 On Its Face Forbids EPA From Overriding The Express Requirements Of RCRA	11

TABLE OF CONTENTS—Continued

Page

B. The Costs Of Compliance To Industry Do Not Provide A Basis For Certiorari 14

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: Page

American Petroleum Institute v. EPA, 906 F.2d 729 (D.C. Cir. 1990) 3
Board of Governors, Federal Reserve System v. Dimension Finance Corp., 474 U.S. 361 (1986) .. 9
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 6
Hazardous Waste Treatment Council v. EPA, 886 F.2d 355 (D.C. Cir. 1989), *cert. denied*, 111 S.Ct. 139 (1990) 3, 7
Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918 (D.C. Cir. 1989) 3
ICC v. Appleyard, 513 F.2d 575 (4th Cir.), *cert. denied*, 423 U.S. 840 (1975) 14
Natural Resources Defense Council v. EPA, 907 F.2d 1146 (D.C. Cir. 1990) 3

Statutes and Regulations:

Clean Water Act, 33 U.S.C. §§ 1251-1387 5
Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j .. 5
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* 2
42 U.S.C. § 6901(b)(5)-(7) 7
42 U.S.C. § 6902(a)(6) 7
42 U.S.C. § 6905(b)(1) 11
42 U.S.C. § 6921(b)(1) 4
42 U.S.C. § 6924(g) 3, 14
42 U.S.C. § 6924(g)(5) 3
42 U.S.C. § 6924(h)(2) 14
42 U.S.C. § 6924(h)(3) 14
42 U.S.C. § 6924(k) 4
42 U.S.C. § 6924(m)(1) ..... *passim*
Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 3
40 C.F.R. § 260.10 (1992) 4
40 C.F.R. § 261.10-.24 4
55 Fed. Reg. 22,651 (1990) 8
55 Fed. Reg. 22,665 8
58 Fed. Reg. 4972 (1993) 14

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INTEREST OF PARTIES

Petitioners in the court of appeals were the Hazardous Waste Treatment Council, Natural Resources Defense Council, Environmental Defense Fund, and Sierra Club. The respondent below was the U.S. Environmental Protection Agency. The Chemical Manufacturers Association and the American Petroleum Institute were intervenors in the HWTC petitioners' case.

The Hazardous Waste Treatment Council ("HWTC") is a national not-for-profit trade association having more than 60 member firms with operations in forty-eight states. HWTC member companies utilize established and emerging technologies for the treatment, recycling, and disposal of hazardous wastes, including thermal destruction, biological and chemical treatment, land disposal after pretreatment, and hazardous site cleanups.

The Natural Resources Defense Council ("NRDC") is a national, non-profit environmental organization with over 107,000 members. NRDC seeks to ensure protection of human health and the natural environment.

The Environmental Defense Fund ("EDF") is a non-profit membership corporation with over 150,000 members dedicated to the protection of human health and the environment by eliminating unnecessary exposures to toxic chemicals.

The Sierra Club is a national conservation organization, founded in 1892, with more than 405,000 members which has participated actively in developing and enforcing various environmental statutes and regulations for the benefit of its members and the public.

STATEMENT OF THE CASE

The RCRA Land Disposal Prohibitions

In the proceeding below, the D.C. Circuit was once again called upon to construe the statutory provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.*, which prohibit the land disposal of hazardous wastes. In 1984, Congress amended RCRA to prohibit the land disposal

of all hazardous wastes. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221. Pursuant to that law, EPA may allow a hazardous waste to be land disposed under only two conditions: (1) if the waste is first pretreated to the section 3004(m)(1) standard which requires significant reduction of the toxicity and mobility of hazardous constituents in the waste so as to minimize short-term and long-term threats, 42 U.S.C. § 6924(m)(1); or (2) if the land disposal facility obtains a no-migration variance by demonstrating that there will be no migration of hazardous contaminants in the untreated waste from the disposal unit for as long as the waste remains hazardous, 42 U.S.C. § 6924(g)(5).

Congress directed EPA to implement the land disposal prohibitions on a phased statutory schedule. 42 U.S.C. § 6924(g). EPA first addressed certain designated hazardous wastes, and then issued regulations for all remaining hazardous wastes one third at a time. The D.C. Circuit has reviewed each of EPA's major rulemakings pursuant to these statutory commands. *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355 (D.C. Cir. 1989), *cert. denied*, 111 S.Ct. 139 (1990) (Framework Rule); *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989) (California List Rule); *American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) (First-Third Rule); *Natural Resources Defense Council v. EPA*, 907 F.2d 1146 (D.C. Cir. 1990) (Deep Well Injection Rule).

The Third-Third Rule

This case involves EPA's regulation establishing the land disposal prohibitions and treatment requirements for the third-third scheduled hazardous wastes.

EPA's regulation deals primarily with wastes that are hazardous because they exhibit a characteristic property: ignitability, corrosivity, reactivity, or toxicity. *See* 42 U.S.C. § 6921(b)(1); 40 C.F.R. § 261.10-.24 (1992). Of significance, these characteristic wastes usually contain hazardous constituents at levels that pose a threat to human health and the environment when land disposed. App. 31a-33a. For example, ignitable wastes exhibit that characteristic precisely because they contain volatile organic contaminants that contribute the property of ignitability. *Id.* Corrosive wastes often contain toxic metal contaminants because the wastes corrode metal parts and equipment. *Id.*

Chemical plants, petroleum refineries, and other industrial facilities generate these characteristic wastes. Often the wastes are aggregated at the industrial facility with large volumes of other wastewater streams for centralized storage, treatment, and disposal. App. 40a. By virtue of this aggregation, the characteristic wastes are diluted such that the hazardous characteristic is removed. The aggregated wastes are then managed in various types of units, including tank systems, surface impoundments, and injection wells.[1] The placement of hazardous waste in a surface impoundment or injection well constitutes land disposal under RCRA. 42 U.S.C. § 6924(k). Hazardous wastes that are destined for

[1] A surface impoundment is an excavated or diked lagoon made primarily of earthen materials designed to hold an accumulation of liquid wastes. 40 C.F.R. § 260.10. The lagoon may be many acres in size, and generally does not have a synthetic or clay liner under the waste. An injection well is a bored or drilled well that is used for emplacement of liquid wastes into a subsurface strata of the earth. *Id.*

land disposal are subject to the section 3004(m)(1) treatment requirements. 42 U.S.C. § 6924(m)(1).

As a relevant concern, the discharge of wastewater from these industrial lagoons is also subject to limitations and permit standards under the Clean Water Act ("CWA"). 33 U.S.C. §§ 1251-1387. The disposal of wastes in underground injection wells is subject to permit standards under the Safe Drinking Water Act ("SDWA"). 42 U.S.C. §§ 300f-300j.

The D.C. Circuit Decision

In the proceeding below, HWTC petitioners sought review by the D.C. Circuit of an egregiously flawed aspect of EPA's regulation. Contrary to the proposed rule, EPA decided to allow mere dilution of characteristic hazardous wastes, in lieu of effective treatment. Specifically, EPA adopted a standard of "DEACTIVATION" for characteristic wastes which would have allowed the hazardous characteristic to be removed by dilution, without removal or destruction of any toxic contaminants in the waste. App. 19a. In addition, EPA adopted an exception to the general prohibition on dilution for characteristic wastes that are aggregated for management in CWA lagoons and SDWA injection wells. App. 43a.

HWTC petitioners argued that EPA's dilution provisions violated RCRA section 3004(m)(1). The court of appeals granted in part our petition for review.

SUMMARY OF ARGUMENT

Rather than an "unwarranted expansion" of judicial review, the court of appeals relied on accepted tools of statutory construction to hold that EPA's regulation did not accord with Congress' commands.

The plain language of RCRA section 3004(m)(1) directs EPA to promulgate treatment standards that will result in the significant reduction of toxicity and mobility of the hazardous constituents in the waste. EPA itself acknowledged that dilution of characteristic wastes does nothing to remove or destroy the toxic contaminants in the wastes. The court of appeals reversed EPA's erroneous position and upheld Congress' clear intent in RCRA. The court adhered to accepted Chevron Step I precedents, and the opinion below does not raise any issues warranting a writ of certiorari.

ARGUMENT

I. THE COURT OF APPEALS DETERMINED THAT EPA'S INCONSISTENT CONSTRUCTION OF SECTION 3004(m)(1) DID NOT ACCORD WITH CONGRESS' CLEAR INTENT

The court of appeals properly applied the principles of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in deciding the issues raised here. The court expressly recognized that "[u]nder *Chevron*, unless Congress has spoken directly to the [petitioners' claims], the EPA's determinations are entitled to deference, if reasonable." App. 21a. The court then found that the crux of HWTC petitioners' challenge to EPA's treatment standard was directly resolved by the relevant statutory provision.

A. The Court Relied On The Plain Meaning of Section 3004(m)(1)

Section 3004(m)(1) of RCRA directs EPA to promulgate treatment requirements for hazardous wastes prior to land disposal. The treatment standards must "substantially diminish the toxicity of the

waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized." 42 U.S.C. § 6924(m)(1). As the court of appeals recognized, this is an "exacting standard." App. 28a. To "minimize threats" means to "reduce [threats] to the smallest possible amount, extent, or degree." *Hazardous Waste Treatment Council v. EPA*, 886 F.2d at 361.

HWTC petitioners argued before the court of appeals that EPA's regulations did not comply with this statutory standard. EPA allowed hazardous wastes to be diluted with water, solid wastes, or other materials, as a substitute for actual treatment of the toxic constituents in the waste. HWTC petitioners demonstrated on the record that dilution eliminates only the short-term threats posed by the waste characteristic, but does nothing to minimize the long-term threats posed by the toxic constituents. App. 30a. These contaminants, if merely diluted, can escape when the hazardous waste is land disposed and cause contamination of the surrounding soil, groundwater, and surface waters. These are the very threats that motivated Congress to enact the land disposal restrictions of section 3004(g)-(m) in the 1984 HSWA. *See* 42 U.S.C. §§ 6901(b)(5)-(7), 6902(a)(6).

The court of appeals carefully considered EPA's regulation in light of the statutory standard of section 3004(m)(1). First, the court declined to hold that dilution can never satisfy the standard. App. 27a. The court concluded that "when read against RCRA's broad definition of treatment, we cannot say Congress clearly barred dilution as an acceptable

[treatment] methodology," citing *Chevron*. App. 28a. To the extent characteristic wastes do not contain toxic constituents at sufficient concentrations to pose a threat to human health and the environment, the court of appeals held that the statute does not constrain EPA from allowing dilution as an acceptable treatment method for eliminating the hazardous characteristic. App. 28a.

However, the court noted that EPA's administrative record showed that many characteristic wastes do, in fact, contain toxic constituents at significant concentrations. App. 30a-34a. EPA itself admitted during the rulemaking that the characteristic "is only one indicator of hazard and, thus, removal of the specific characteristic is not the same as assuring that the waste is safe." App. 30a, citing 55 Fed. Reg. at 22,651. EPA itself acknowledged that eliminating the hazardous characteristic by dilution "does not fully address the potential problem of toxic constituents that may be present in the wastes . . . ." App. 20a and 30a, citing 55 Fed. Reg. at 22,665.

The court of appeals properly concluded that section 3004(m)(1) of RCRA expressly requires treatment of the toxic constituents in hazardous wastes to minimize the threats posed. EPA's failure to require the appropriate method and extent of treatment of these hazardous wastes was unexplained and unrebutted in the record. The court of appeals correctly concluded that EPA must require treatment of the toxic constituents in these hazardous wastes "[t]o conform with its own reading of section 3004(m) . . . ." App. 32a.

B. The Court Applied The Same Construction of Section 3004(m)(1) To Characteristic Wastes Managed in CWA Lagoons and SDWA Injection Wells

The court of appeals next turned to when hazardous wastes are treated in Clean Water Act lagoons and Safe Drinking Water Act injection wells. App. 37a. The court saw no basis in the statute, and EPA pointed to none, that would allow dilution in lieu of treatment of the toxic constituents when such wastes are managed in lagoons and injection wells. App. 38a. Indeed, CWA lagoons often have no liners to serve as a barrier between the waste and the land, so that untreated toxic constituents can escape directly into the soil, groundwater, and surface waters. Similarly, SDWA injection wells are a method of placing wastes directly into a subsurface strata of the earth, so that untreated toxic constituents can again pose a threat of escape.

Therefore, the court of appeals concluded that hazardous wastes managed in CWA lagoons and SDWA injection wells must receive the treatment required by RCRA section 3004(m)(1). App. 44a-47a. This was "the meaning of the statute Congress enacted here," relying on Chevron Step I and citing *Board of Governors, Federal Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986). App. 44a. Again, the court concluded that given the "exacting standard" of section 3004(m)(1), EPA could not construe the statute in an inconsistent manner. The court opined that "[t]he EPA cannot colorably claim that RCRA permits lesser treatment in this part of the case than in the first part of this case." App. 46a.

C. The Court Could Not Defer To EPA's Self-Contradictory Rationale

EPA's rationale for its inconsistent construction of section 3004(m)(1) simply did not pass Chevron Step I muster. EPA conceded that section 3004(m)(1) applies to a hazardous waste at the point of its generation. App. 22a. Indeed, EPA itself rejected industry arguments that section 3004(m)(1) applies only to hazardous wastes at the point of land disposal. App. 46a. The court of appeals agreed with EPA that the industry's erroneous reading of the statute would effectively eviscerate section 3004(m)(1) treatment, because a hazardous waste could receive sham or inadequate treatment that does not satisfy section 3004(m)(1) if the waste was not subject to that treatment standard until the actual point of land disposal.

Yet EPA adopted the same erroneous rationale in defending its dilution regulation for characteristic wastes managed in CWA lagoons and SDWA injection wells. App. 46a. EPA asserted that in these circumstances it had "discretion" to apply section 3004(m)(1) only at the point of land disposal—at which point, of course, the characteristic wastes are diluted. The court of appeals could not accept "exactly the argument industry petitioners previously made and the EPA rejected." *Id.* EPA could not "take a position here radically at odds with its prior position." *Id.* The court held that RCRA section 3004(m)(1) applies to hazardous wastes that are destined for land disposal and requires complete treatment. *Id.* The court reached this result based on the plain language, statutory context, and relevant legislative history of section 3004(m)(1), consistent with Chevron Step I principles. App. 44a-50a.

The decision of the court of appeals was correct, and does not represent any misapplication or unbounded extension of this Court's Chevron Step I principles. The court of appeals has had substantial experience in construing the specific statutory provisions at issue in this case. The appellate court's opinion reflects a careful and common sense construction of section 3004(m)(1), and does not raise any issues that warrant review by this Court.

II. THE COURT'S CONSTRUCTION OF SECTION 1006 COMPORTS WITH THE CLEAR INTENT OF CONGRESS

The court of appeals also properly construed the "integration clause" of RCRA consistent with Chevron Step I principles. Section 1006(b)(1) directs EPA to "integrate all provisions of [RCRA] for purposes of administration and enforcement and [to] avoid duplication, to the maximum extent practicable," with other environmental laws. 42 U.S.C. § 6905(b)(1). Section 1006(b)(1) goes on to stipulate, however, that "[s]uch integration shall be effected only to the extent that it can be done in a manner consistent with the goals and policies expressed" in RCRA and other environmental laws. *Id.*

A. The Court Held That Section 1006 On Its Face Forbids EPA From Overriding The Express Requirements Of RCRA

EPA relied on section 1006(b)(1) as a further rationale for allowing hazardous wastes to be managed in CWA lagoons and SDWA injection wells, without section 3004(m)(1) treatment. EPA asserted that this "accommodation" was necessary to integrate RCRA with the CWA and SDWA. App. 46a. The court of appeals held, however, that section

1006(b)(1) by its own terms does not allow EPA to override the express requirements of RCRA. App. 48a. Therefore the court upheld those portions of EPA's regulation that address hazardous wastes in a manner consistent with both RCRA and the other environmental statutes, but reversed to the extent EPA allowed the "exacting standard" of RCRA section 3004(m)(1) to be overridden. App. 50a, 53a.

The court first noted that characteristic wastes are often aggregated with large volumes of non-hazardous wastewaters for treatment in CWA lagoon systems. App. 44a-45a. This aggregation can result in dilution of the characteristic wastes. The "decharacterized" wastes are then further treated in the CWA lagoons in a manner that biologically degrades the toxic contaminants in the aggregated waste stream. Applying the plain meaning of section 1006(b)(1), the court of appeals concluded that EPA's decision to allow "decharacterized" hazardous wastes to be managed in lagoons as part of a continuing treatment process was a reasonable accommodation of both RCRA and the CWA. App. 47a. The RCRA prohibition on the land disposal of untreated hazardous wastes is not overridden because EPA does not allow the CWA lagoons to receive wastes that are still "hazardous wastes."

By the same token, the court of appeals emphasized that the decharacterized wastes managed in CWA lagoons must still ultimately receive the treatment required by section 3004(m)(1). In other words, the hazardous waste may be aggregated for treatment in the CWA lagoon "*if and only if* the resulting CWA treatment fully complies with RCRA § 3004(m)(1)." App. 47a. As the court of appeals correctly observed, only this result "satisfies RCRA's requirement that

any accommodation 'be done in a manner consistent with the goals and policies' of *both* RCRA and CWA." App. 48a (emphasis in original). The court of appeals applied fundamental Chevron Step I principles, holding that "[w]hile section 1006(b)(1) requires some accommodation with existing treatment regimes, that section *by its terms* does not permit the substantive standards of RCRA to be compromised." *Id.* (emphasis added).

With respect to hazardous wastes that are "decharacterized" for disposal in SDWA injection wells, the administrative record showed that no treatment whatsoever of toxic constituents occurs in the injection well. App. 53a. While CWA lagoons are used for treatment, SDWA injection wells are used solely for final disposal. The court of appeals observed, "[u]nlike the CWA system context, where the hazardous wastes can be eventually treated to RCRA standards, injected wastes are not treated further." *Id.* As a result, allowing hazardous wastes to be diluted and then deep well injected, without treatment of the toxic constituents in the waste to section 3004(m)(1) standards, "would completely avoid the balance Congress struck in RCRA." *Id.* Neither the treatment requirements of section 3004(m)(1), nor the no-migration standard of section 3004(g), would be met. In this context, the court of appeals concluded that "[s]ection 1006(b)(1) cannot be used to wholly circumvent RCRA." *Id.*

The court of appeals' decision was correct, based on a straight-forward application of Chevron Step I principles. No reason for granting the writ of certiorari is presented.

B. The Costs Of Compliance To Industry Do Not Provide A Basis For Certiorari

Petitioners' claims that the appellate decision will wreak "multi-billion dollar, multi-year" disruption to industry are alarmist and unfounded, and provide no further grounds for granting the writ. EPA has already begun the development of regulatory proposals that respond to the appellate decision. *See* 58 Fed. Reg. 4972 (1993). EPA can be expected to take into account the cost to industry in developing the new regulations to the extent permitted by the statute.

In any event, Congress prohibited land disposal of hazardous wastes and directed EPA to establish treatment requirements that satisfy section 3004(m)(1). The cost of compliance to industry cannot change these statutory mandates. Presumably Congress was aware of the compliance costs in enacting the 1984 HSWA, and for that reason the statute phases in the land disposal prohibitions over a six year period. *See* 42 U.S.C. § 6924(g). Congress had the means to further address compliance burdens, and the statute in fact provides certain variances, extensions, and waivers to lessen the burden. *See* 42 U.S.C. § 6924(h)(2) (national capacity extension); § 6924(h)(3) (case-by-case extension); § 6924(g)(5) (no-migration variance). The court of appeals already considered industry's argument that compliance will be burdensome, and correctly concluded that this argument is "irrelevant" in light of the plain statutory commands. App. 55a. *See also ICC v. Appleyard*, 513 F.2d 575, 577 (4th Cir.) (federal courts cannot review agency action based on their views of reasonable economic policy), *cert. denied*, 423 U.S. 840 (1975).

Accordingly, the industry petitioners' arguments regarding the burden of compliance cannot justify a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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